United Nations A/CN.9/973

General Assembly

Distr.: General
24 May 2019

Original: English

United Nations Commission on International Trade Law
Fifty-second session
Vienna, 8–19 July 2019

Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-fifth session (New York, 13–17 May 2019)

I. Introduction

1. At its thirty-fifth session, the Working Group considered for the first time the topic of the judicial sale of ships. This followed a decision by the Commission, at its fifty-first session (New York, 25 June – 13 July 2018), to add the topic to the work programme of the Commission, and for the topic to be allocated to the first available working group.[1] Having subsequently completed its work on a practice guide to the Model Law on Secured Transactions at its thirty-fourth session, the topic was allocated to the Working Group.

2. Background information on the decision to add the topic to the work programme of the Commission may be found in working paper A/CN.9/WG.VI/WP.80, paragraphs 5–11.

II. Organization of the session

3. The Working Group, composed of all States members of the Commission, held its thirty-fifth session in New York from 13 to 17 May 2019. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Brazil, Bulgaria, Burundi, Canada, China, Colombia, Côte d'Ivoire, Czechia, Denmark, France, Germany, Greece, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kuwait, Lesotho, Libya, Panama, Philippines, Republic of Korea, Romania, Russian Federation, Sierra Leone, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey and United States of America.

4. The session was also attended by observers from the following States: Bahrain, Belgium, Cabo Verde, Cambodia, Central African Republic, Costa Rica, Croatia, Democratic Republic of the Congo, Dominican Republic, Finland, Ghana, Iraq, Madagascar, Malta, Netherlands and Sudan.

5. The session was also attended by observers from the Holy See and the European Union.

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 252.

6. The session was also attended by observers from the following international organizations:

International non-governmental organizations: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), Comité Maritime International (CMI), Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional (GRULACI), International Association of Judges (IAJ), International Bar Association (IBA), International Chamber of Shipping (ICS), International Law Institute (ILI), International Union of Maritime Insurance (IUMI), New York City Bar Association and the Law Institute for Asia and the Pacific (LAWASIA).

7. The Working Group elected the following officers:

Chairperson: Ms. Beate CZERWENKA (Germany)

Rapporteur: Mr. Djegnine TCHETCHE (Côte d'Ivoire)

8. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.VI/WP.80); (b) a note by the Secretariat containing the proposals of the CMI and of Switzerland for possible future work on cross-border issues related to the judicial sale of ships (A/CN.9/WG.VI/WP.81); and (c) a note by the Secretariat containing the proposed draft instrument prepared by the CMI (A/CN.9/WG.VI/WP.82).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Note by the Secretariat on the Judicial Sale of Ships.
5. Adoption of the report.

III. Deliberations and decisions

10. The Working Group proceeded with its consideration of the topic on the basis of the documents listed in paragraph 8 above. The deliberations and decisions of the Working Group on the topic are found in chapter IV of this report.

IV. Note by the Secretariat on the Judicial Sale of Ships

A. Preliminary considerations

11. The Working Group agreed to begin its deliberations by considering the need for an international instrument relating to the judicial sale of ships, in view of existing national laws and existing international instruments, as well as the scope of the problems to be addressed.

12. The proposals of the CMI and of Switzerland were introduced to highlight the gap in the current legal framework. It was noted that the lack of legal certainty as to the acquisition of clean title (i.e., title free of all encumbrances) and the inability of the purchaser to deregister the ship following a judicial sale had a negative effect on the price that the ship could attract in the market (whether by public auction or private treaty). Conversely, it was suggested that a legal instrument providing for the acquisition of clean title and obliging the registrar to deregister the ship at the election of the purchaser would lead to a higher sale price, which would in turn lead to greater proceeds to be distributed among creditors.

13. It was noted that the lack of legal certainty as to those two aspects of the judicial sale was of concern not only to shipowners, but also to financiers, maritime service

providers, and crew, since a lower purchase price resulted in the lower recovery of their claims against the selling shipowner. It was also explained that this uncertainty had a negative effect on international trade and on maritime insurance coverage.

14. It was noted that the draft convention on the recognition of foreign judicial sales of ships, which was approved by the CMI Assembly in 2014 (the "Beijing Draft"), had been prepared by an international working group in consultation with national maritime law associations and consultative members of the CMI. Successive drafts of the text were prepared over several years on the basis of a survey on law and practice in various jurisdictions. It was further noted that the Beijing Draft was drafted with the input of a broad collection of stakeholders in the maritime industry from a broad geographical reach.

15. On the need for an international instrument, it was noted that clean title afforded by a judicial sale was already recognized under several national laws, and that many jurisdictions already recognized the effects of foreign judicial sales, for instance on the basis of comity. However, no uniform legal regime existed. Indeed, although provisions on the forced sale of ships were contained in the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (1967) ("MLMC 1967") and the International Convention on Maritime Liens and Mortgages (1993) ("MLMC 1993"), these conventions had not been widely accepted. It was also noted that current issues related to the judicial sale of ships arose not only in the context of the enforcement of a maritime lien or mortgage, and that there might be other claims that led to the judicial sale of a ship, such as loss of or damage to cargo. Furthermore, it was emphasized that the issue was not only of recognizing the acquisition of clean title but also of the deregistration of the ship at the election of the purchaser.

16. It was suggested that more data on the scale and the scope of the problems to be addressed by the Working Group would be useful in terms of the number of cases in which a foreign judicial sale had not been recognized and the reasons for such non-recognition. In response, several court cases from a variety of jurisdictions were described, including ongoing proceedings. However, it was also stated that the number of cases would not be indicative of the economic impact because the legal uncertainty in general had a far-reaching impact on the market as a whole. It was recalled that the Commission's decision to add judicial sale of ships to the work programme was based upon the proposal of Switzerland, which had in turn reported on the views expressed by stakeholders at the Malta colloquium that an instrument was needed to address the issues that they faced in practice.

17. After discussion, there was broad agreement that the judicial sale of ships gave rise to various important practical problems, as described in document A/CN.9/WG.VI/WP.81, and that the Working Group would further discuss how those problems could be effectively addressed by an international instrument.

18. It was noted that the Beijing Draft focused on the acquisition of clean title and deregistration. The Working Group considered whether the instrument should address additional issues, namely: (a) forced sales that were carried out by authorities other than courts; (b) private sales; (c) conflict of laws issues, including the law applicable to the judicial sale; (d) notice requirements for the judicial sale and other procedural matters; (e) how the proceeds of sale were distributed; (f) remedies for the wrongful or abusive re-arrest of a ship following a judicial sale; and (g) the interaction between the instrument and other international agreements.

19. With regard to (a), it was noted that some national laws provided for authorities to carry out a forced sale in tax, administrative and criminal matters, among others. Some reservations were expressed as to addressing these types of sales. It was suggested that the instrument should only apply to forced sales where the proceeds were to be paid out to creditors, and not to the State treasury. It was also suggested that the draft instrument should require States to designate competent authorities to facilitate the task of the authorities in the State where recognition and deregistration was sought.

20. With regard to (b), it was generally agreed that the instrument should not apply to "purely" private sales, but that it could apply to private sales that were ordered or supervised by a court or other competent authority.

21. With regard to (c), the distinction was emphasized between the judicial sale on the one hand, and the decision on the merits of the claim giving rise to the judicial sale on the other hand. It was suggested that the instrument should not deal with jurisdiction or applicable law issues relating to the claim giving rise to the judicial sale. At the same time, a question was raised whether it was possible to dissociate the judicial sale entirely from the decision on the merits.

22. With regard to (d) and (e), it was noted that these issues were ordinarily a matter for the law of the country where the judicial sale took place. At the same time, it was emphasized that notice provisions were important to ensure fairness for all interested parties and to provide assurances to the registrar that was asked to deregister a ship following a judicial sale. It was also noted that, in some States, the law on the priority of claims was not well developed.

23. With regard to (f), it was noted that the wrongful arrest of ships was an issue beyond the context of the judicial sales, and that the Working Group should focus on issues specific to the judicial sale of ships.

24. With regard to (g), particular attention was drawn to ongoing work at the Hague Conference on Private International Law on a draft convention on the recognition and enforcement of foreign judgments in civil or commercial matters. In this regard, it was noted that, although some maritime matters were expressly excluded from the scope of the current draft of the convention, judicial sales of ships were not, and that the draft explanatory report stated that maritime liens and mortgages were included in the scope of the draft convention.[2] At the same time, it was noted that the draft convention only applied to a "judgment", which was defined in article 3(1)(b) of the current draft to cover only a decision on the merits. In this regard, the distinction between the judicial sale of ships and the decision of the merits of the claim giving rise to the judicial sale (see para. 21 above) was reiterated. It was further noted that the draft convention contained provisions dealing with interaction with future instruments. It was suggested that coordination between the two projects was desirable. In response, reference was made to the very advanced stage of that project and to the fact that maritime liens and mortgages were already included in the scope of the Convention on Choice of Court Agreements (2005) ("Choice of Court Convention").

25. After discussion, there was broad agreement that the Working Group should initially focus on the issues of clean title and deregistration, and that the Beijing Draft would provide a useful basis for discussion. It was agreed that it would be premature for the Working Group to consider the form of any eventual instrument.

B. Proposed draft instrument prepared by the Comité Maritime International

26. The Working Group agreed to proceed to consider the main issues addressed in the Beijing Draft, namely the effects of a judicial sale, the procedural requirements therefor, and the definitions and scope of the draft instrument, without prejudice to the form that such an instrument might take.

1. Article 4. Effect of judicial sale

27. The Working Group heard how article 4 of the Beijing Draft built upon article 12(1) of the MLMC 1993 and laid down two conditions for a judicial sale to

[2] *Preliminary Document No. 1 of December 2018 for the Twenty-Second Diplomatic Session of the Hague Conference on Private International Law*, available at https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf, para. 49.

have the effect set forth in the draft instrument, namely (a) that the ship be located within the geographic territory of the State of judicial sale, and (b) that the sale comply with the procedural requirements of the law of that State and those of the Beijing Draft.

28. It was noted that the physical location of the ship within the territory of the State of judicial sale was not required in all jurisdictions. It was explained that the word "physically" was inserted into the Beijing Draft to convey the ability of the competent authority to exercise physical control over the ship. A question was raised as to whether the ship must remain in the territory during the entire judicial sale procedure. A suggestion was made to define "time of the Judicial Sale" as it appeared in articles 4(1)(a) and 8(a) to refer to the moment at which the competent authority ordered the sale of the ship.

29. It was noted that the condition in article 4(1)(b) of the Beijing Draft reinforced the view expressed earlier (see para. 21 above) that the instrument did not deal with conflict of law issues. In particular, it was reiterated that the distribution of proceeds and the priority of claims would be resolved by the competent authority applying the law of the State of judicial sale (including the applicable substantive law determined in accordance with its conflict of law rules).

30. At the same time, it was noted that the Beijing Draft did address some procedural matters, as indicated by the condition in article 4(1)(b) that the judicial sale be conducted in accordance with the provisions in the Beijing Draft. A query was raised whether the Beijing Draft imposed minimum standards, or whether it superseded national law, which might impose higher standards (e.g., notice periods longer than those required by article 3). Although it was generally felt that the Beijing Draft imposed minimum standards, it was suggested that the Working Group further consider what would occur in the event of a conflict with national law.

31. It was noted that the definition of a "judicial sale" in article 1(h) already dealt with the legal effect of the sale (insofar as it referred to the acquisition of clean title as an element of the judicial sale), and incorporated a requirement that proceeds be made available to creditors. It was felt that the Working Group should consider the definition of judicial sale more closely (see paras. 89 to 91 below) and determine whether these elements of the judicial sale should be contained in the definition or moved to the substantive provisions of the draft instrument. A suggestion was made to include a provision that expressly excluded the distribution of proceeds from the scope of the instrument.

32. A general point was raised that excepting rights and interests that were "assumed by the Purchaser" from the clean title acquired under the Beijing Draft might be problematic. The example was given of a purchaser who assumed a registered mortgage then sought to reregister the ship and transfer the mortgage to the new registry. It was observed that the Beijing Draft did not provide for the registered mortgagee to consent to the transfer, nor oblige the registrar to deregister the mortgage. It was queried whether, in practice, purchasers in a judicial sale did assume existing mortgages/hypothèques or charges; if not, it was suggested that the exception relating to rights and interests "assumed by the Purchaser", not only in article 4 but also in other provisions of the Beijing Draft, be deleted.

33. A suggestion was made that article 4(1) should expressly state that the extinguishment of prior rights and interests did not apply to property that was often collateralized with the ship, such as cargo.

34. The Working Group heard that, while the intent of article 4(1) would be to extinguish prior rights and interests in the ship, article 4(2) was intended to preserve *in personam* claims against the former shipowner. It was felt that, to ensure that this objective was maintained, the draft could clarify that "any rights", as it appeared in article 4(2), referred to personal rights. The Working Group also discussed whether article 4(1) would have the effect of terminating a bareboat charter. It was noted that article 4(1) was not concerned with contractual rights. Reference was made to

article 11(1) of the MLMC 1967, which provided that, for the purpose of the effects of a forced sale, "[n]o charter party or contract for the use of the vessel shall be deemed a lien or encumbrance".

35. It was noted that, in some jurisdictions, a judicial sale did not have the effect of extinguishing all rights and interests in the property being sold. For instance, it was noted that the law may preserve the rights of a registered leaseholder, or provide for the continued registration of unsatisfied creditors despite a judicial sale. It was noted that these judicial sales could be considered beyond scope as they did not result in the acquisition of clean title, and therefore fell outside the definition of "Judicial Sale" in article 1(h). The view was expressed that the instrument should not apply to these judicial sales.

36. Various suggestions were made for accommodating these judicial sales in an international instrument. One suggestion was that the scope of application of the instrument be limited to judicial sales in international cases, for instance in cases where the seller and purchaser had their residence in different States. It was noted that this limitation could lead to an uneven playing field between foreign and domestic purchasers, as only the former would benefit from the recognition regime under the instrument, and this would affect the market price for the ship. The point was also made that it was difficult to conceive of judicial sales as purely domestic given the international nature of shipping.

37. Another suggestion was that the instrument provide for the issuance of a "qualified" certificate that specified the existence of the preserved right, and then confer on the registrar a discretion whether to deregister the ship following the judicial sale. Some reservations were expressed about introducing a qualified title into the instrument. Yet another suggestion was that the exception in article 4(1) of the Beijing Draft (that the effect of the judicial sale was subject to any rights and interests that were "assumed by the Purchaser") be expanded so as to apply to rights and interests that were preserved under the law of the State of judicial sale. Some doubt was raised about the feasibility of such a solution.

38. It was added that, if such judicial sales were accommodated in an international instrument, a State should still be obliged to recognize clean title acquired in its flagged ships resulting from judicial sales conducted abroad. It was observed that foreign judicial sales that extinguished certain rights that were considered mandatory laws of the State where recognition was sought might trigger the public policy ground for refusal in article 8(c) of the Beijing Draft (for further discussion of this ground for refusal, see para. 62 below).

39. It was pointed out that the central effect of a judicial sale was to transfer ownership of the ship to the purchaser, but that this was not clearly stated in article 4. In response, it was noted that both articles 5 and the form of the certificate in the annex to the Beijing Draft assumed the transfer of title to the purchaser, which was effected through registration under article 5.

40. It was noted that the draft did not contain an exception for State-owned ships. While it was stated that maritime conventions did not ordinarily exclude ships owned in whole or in part by a State that were engaged in civil or commercial activity, it was suggested that some States might nonetheless have an interest in excluding these ships from the recognition regime.

2. Article 5. Issuance of a certificate of judicial sale

41. It was explained that article 5(1) was modelled on article 12(5) of the MLMC 1993. The Working Group agreed in principle with the utility of a provision dealing with the issuance of a certificate of judicial sale by the competent authority.

42. A question was raised as to whether the competent authority was authorized to certify the acquisition of clean title, as required by paragraph (b) and the second part of paragraph (a), given that the acquisition of clean title already flowed from article 4(1) of the Beijing Draft. It was suggested that the competent authority be

required instead to certify (a) that the ship was sold in accordance with the law of the State of judicial sale and the provisions of the instrument (as presently provided for in the first part of paragraph (a) of article 5(1) of the Beijing Draft), and (b) that the ship was physically within the jurisdiction of the State of judicial sale at the time of judicial sale (reflecting the condition in article 4(1)(a) of the Beijing Draft). In response, it was observed that it was not unusual to require a competent authority to certify legal effects, as evidenced by article 12(5) of the MLMC 1993, which provided for the competent authority to certify the acquisition of clean title.

43. It was noted that the drafting of paragraphs (a) and (b) of article 5(1) might be further considered. In that regard, it was suggested that both paragraphs covered the acquisition of clean title, which was a defined term in article 1. It was queried whether paragraph (b) should also be subject to the exception of rights and interests that were "assumed by the Purchaser" (see para. 32 above).

44. A number of suggestions were made to clarify or expand the particulars to be contained in the certificate, as specified in article 5(2). First, it was suggested that paragraph (e) be amended to clarify that the "owner" was the shipowner prior to the judicial sale. Second, it was suggested that the certificate contain the contact details for the competent authority, to allow the registrar to confirm the authenticity of the certificate. Third, it was suggested that the certificate specify the creditors whose interests were satisfied or extinguished by the judicial sale. It was noted in response that this requirement might delay the issuance of the certificate, as details of all creditors might not be known until sometime after the judicial sale, especially when actions on the merits were decided after the judicial sale, and that the purchaser might wish to obtain the certificate (e.g., for the purposes of deregistration) before this time. Fourth, it was suggested that the certificate specify the sale price. A question was raised as to the need for the inclusion of this particular, and whether problems might arise in view of the conclusive effect of the certificate pursuant to article 7(5). Finally, it was suggested that the reference to "other confirmation of authenticity of the Certificate" in paragraph (i) could be clarified.

45. A query was raised as to whether the certificate could or should be subject to legalization. It was noted that, at first glance, the certificate would be a "public document" within the meaning of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961) ("Apostille Convention"), and would therefore be eligible for issuance of an Apostille under that Convention. It was further noted that, in line with more recent trends in conventions concluded by the Hague Conference on Private International Law, the Working Group could consider including a provision that removed any requirement of legalization or similar requirement (such as the issuance of an Apostille).[3]

46. A suggestion was made that, in order to maximize the utility of the certificate, the instrument should require the competent authority to submit certificates to a centralized repository to be established under the draft instrument. Some reservation was expressed as to the potential cost of such a mechanism. As an alternative, it was suggested that the instrument include a requirement, like that in article 7 of the Apostille Convention, that the competent authority maintain a publicly accessible record of certificates issued.

47. It was observed that, if the instrument were to take the form of a convention, and the convention applied to the recognition of judicial sales conducted in a non-State party, the competent authority in that State would not be bound by article 5 to issue a certificate of judicial sale. It was added that this might, in practice, limit the ability of the judicial sale to be recognized (as both articles 6 and 7 depended on the issuance of a certificate "in accordance with article 5"). In response, it was noted that there was nothing in the Beijing Draft that prevented a non-State party from legislating a requirement (under national law) for its competent authorities to issue a

[3] See, for example, article 18 of the Choice of Court Convention.

certificate in accordance with article 5, which would allow the judicial sale to benefit from the recognition regime under the Beijing Draft.

3. Article 6. Deregistration and registration of the ship

48. It was explained that draft article 6 was modelled on article 12(5) of the MLMC 1993, and included an additional provision for instances where the ship was temporarily flying the flag of a State of bareboat charter registration. It was noted that the ship would need to be deregistered from both the bareboat charter registry as well as from the registry where the ship was registered prior to its sale. The point was made that, in such instances, the purchaser would want to be provided with more than one certificate by the competent authority of the State of judicial sale.

4. Article 7. Recognition of judicial sale

49. The Working Group heard that the MLMC 1993 did not contain a provision on the recognition of judicial sale like that found in article 7 of the Beijing Draft. This prompted a preliminary question as to the need for a separate provision on recognition. It was noted that article 4 of the Beijing Draft already dealt with the effect of the judicial sale, which would have to be respected by all States adopting the instrument. The Working Group considered at some length the relationship between articles 4 and 7. The Working Group agreed that further consideration was needed as to what it meant to "recognize" a judicial sale, and how recognition manifested itself in various contexts. It was noted that one instance was the obligation to deregister the ship, as provided for in article 6. The Working Group noted a suggestion that article 7(1) be recast to refer to an obligation not to deny the legal effect of the judicial sale (as opposed to an obligation to recognize the judicial sale), and agreed that such an alternative formulation deserved to be reflected in a revised version of the draft article.

50. Turning to the text of article 7, a question was raised as to whether compliance with the notice requirements in article 3 of the Beijing Draft should be a condition for the recognition of the judicial sale under article 7(1).

51. With regard to article 7(3), some support was expressed for retaining a provision that channelled exclusive competence to the courts of the State of judicial sale to hear challenges to the judicial sale. It was questioned whether the courts of other States should also have competence, such as the State of residence of the purchaser or the State of registration. In response, it was observed that this would lead to multiple courts in different jurisdictions being seized of such a matter at the same time, leading to delay and further uncertainty. It was also observed that the provision should accommodate the fact that, in some jurisdictions, competence for these matters was vested not in courts but in other authorities and that the review of the judicial sale should be left to the law of the State of judicial sale. A query was also raised as to whether this provision superseded an exclusive choice of court agreement between the relevant parties. After discussion, it was decided that further consideration should be given to the issue of exclusive competence.

52. A question was raised as to the enforceability of article 7(3). In this regard, it was noted that, if the instrument were to take the form of a convention, article 7(3) would apply not only to a judicial sale that was conducted in a non-State party, but also to a judicial sale that might not satisfy the conditions in article 4(1), specifically the condition regarding the physical location of the ship at the time of the judicial sale. It was agreed that article 7(3) could be redrafted so as to limit the judicial sales to which it applied.

53. The view was also expressed that, if the instrument were to take the form of a convention, the recognition regime under article 7 should apply only to judicial sales conducted in a State party, although possibly with the option for a State party to extend the recognition regime to a non-State party, whether by way of declaration or under its national law. It was added that, if the instrument were to take the form of a model law, further thought would be needed as to how to imbed reciprocity in the

recognition regime (for other issues arising from the application to non-State parties, see para. 47 above).

54. A suggestion was made to provide a time limit in which the judicial sale could be challenged. While there was some support for this suggestion, there was also a concern expressed that this kind of provision would encroach too much on the procedural law of each State, and that it might be difficult to reach consensus on the length of time. It was noted that a time limit had been proposed in an earlier version of the Beijing Draft, but the international working group of the CMI had decided ultimately not to include such a provision.

55. It was noted that article 7(4) had the effect of denying standing of certain classes of affected persons to challenge a judicial sale before the courts of the State of judicial sale. Specifically, it was noted that the term "Interested Person", as defined in article 1(g) of the Beijing Draft, did not encompass holders of a maritime lien, such as a lien for unpaid wages (for further discussion of this definition, see paras. 86 to 87 below). While some support was expressed for retaining article 7(4), there was strong support for the concern that, in many jurisdictions, denying the right to challenge (or appeal) a judicial sale could be seen as a restriction on the constitutional right to access to justice. At the same time, it was observed that access to justice was not an absolute right in all jurisdictions, and could be subject to restrictions that were proportionate to a legitimate objective. In this regard, a query was raised as to what interest a holder of a maritime lien might have in challenging the judicial sale itself, as opposed to an interest in the distribution of proceeds. It was also noted that article 7(4) did not prevent a person other than an "Interested Person" from seeking other remedies against the purchaser, such as proceedings in tort for fraud. A suggestion was made that the classes of persons with standing to challenge a judicial sale be those classes of persons to which notice of the judicial sale was to be given under article 3 of the Beijing Draft (which included holders of a maritime lien). There was a suggestion that, in considering an expansion to the definition of the term "Interested Person", it was important that article 7(4) provide finite circumstances in which a judicial sale could be challenged.

56. It was suggested that provisions on challenging a judicial sale should not be included with provisions on recognizing the judicial sale. Two further distinctions were emphasized, namely (a) the distinction between challenging the judicial sale and challenging the distribution of the proceeds of sale, and (b) the distinction between challenging the judicial sale and challenging the deregistration of the ship. It was further recalled (see para. 34 above) that the Beijing Draft did not affect *in personam* claims that an affected person might have against the former shipowner.

57. It was suggested that the concept of "bona fide" purchaser (as it appeared in article 7(4)) be clarified. It was also suggested that the instrument include a language requirement for a certificate of judicial sale that was used for the purposes of recognition proceedings under article 7(1). It was noted that this could be modelled on the requirement in article 6(3).

58. Finally, it was felt that the drafting of article 7, particularly articles 7(3) and 7(4) could be redrafted to avoid repetition.

5. Article 8. Circumstances in which recognition may be suspended or refused

59. The Working Group heard that the MLMC 1993 did not contain a provision on the grounds for refusing or suspending the recognition of judicial sale like that found in article 8 of the Beijing Draft. It was explained that, if a ground for refusal applied, the obligations under article 7, including the obligation in article 7(2) for a court to dismiss an application for the re-arrest of the ship, were not engaged. A question was raised as to the effect of the grounds for refusal on the deregistration of the ship under article 6.

60. A question was also raised as to what would occur when a certificate was not accepted as being issued in accordance with article 5 of the Beijing Draft. It was

generally felt that a decision not to accept the certificate in one State would not bind the court of another State. It was also stated that the non-acceptance of the certificate would not in fact invalidate the sale, as the certificate was merely evidence of the sale conferring the purchaser with clean title, as provided in article 7(5).

61. A more fundamental question was raised as to whether it was appropriate to refer to a refusal to recognize a judicial sale as this presupposed that the judicial sale already had legal effect. After discussion, the Working Group agreed that the form and substance of the grounds for refusal would ultimately depend on how the effect of judicial sales was reflected in the instrument. It was nevertheless felt that there would be instances in which the effects of a sale should be suspended or denied and that these should be reflected in the instrument. A practical example was given in which the previous owner would contest the judicial sale in the State of judicial sale and, during that process, would want to ensure that the ship was not deregistered in another State.

62. Turning to the text of article 8, it was suggested that article 8(b)(ii) not refer to "appeal", as this term might not cover all forms of redress that might be available in the State of judicial sale to review an unlawful decision. It was also suggested that the term "manifestly" be deleted from article 8(c) out of concern that it was too vague. In response, it was explained that the term was designed to avoid an overly abusive or expansive application of the public policy ground. It was also noted that the concept of being "manifestly" contrary to public policy was found in recent instruments on the recognition of foreign judgments, including the Choice of Court Convention. There was general agreement in the Working Group to retain a ground for refusal based on public policy.

63. Several suggestions were made to expand the list of grounds for refusal based on those found under national law or international instruments relating to the recognition of foreign judgments. First, it was suggested that the instrument could include a ground based on fraud, which could cover both substantive and procedural fraud. There was broad support for the inclusion of this ground. At the same time, there was some concern about including the ground, and the point was made that the focus of the inquiry into fraud would need to be the judicial sale itself and not the subsequent distribution of proceeds of sale. It was suggested that this would necessarily imply some wrongdoing on the part of the purchaser. Second, it was suggested that the instrument include a ground based on failure to give notice to affected parties in accordance with article 3. There was equally broad support for the inclusion of this ground.

64. A further suggestion was made that the instrument should allow a court to refuse recognition of a judicial sale that was conducted while insolvency proceedings in respect of the shipowner were pending in another State. There was some opposition to this suggestion with the view expressed that the coordination of cross-border insolvency proceedings was a matter outside the scope of the draft instrument, and that, even in countries that had adopted laws favourable to international cooperation, such as laws based on the Model Law on Cross-Border Insolvency,[4] the court in the State of judicial sale would only be required to defer to the foreign insolvency proceeding after its recognition in that State.

65. A concern was raised about conflating the grounds for refusal to recognize a foreign decision on the merits and the grounds for refusal to recognize a foreign judicial sale. It was observed that a situation could arise where a decision on the merits of the claim giving rise to the judicial sale would not be recognized (under national law or international conventions) but the judicial sale would be recognized under the Beijing Draft. It was suggested that the Working Group consider this situation further.

66. Another concern was raised about opening the grounds for refusal too far beyond the conditions set out in the instrument itself, which could risk undermining the effectiveness of the recognition regime. In this regard, the alternative was

[4] United Nations publication, Sales No. E.14.V.2.

suggested for article 8 to refer to the failure to fulfil the conditions in paragraphs (a) and (b) of article 4(1) (i.e., that the ship was not physically within the jurisdiction of the State of judicial sale at the time of the judicial sale, and/or that the judicial sale was not conducted in accordance with the law of that State or the provisions of the instrument). There was some support for this suggestion.

6. Article 3. Notice of judicial sale

67. The Working Group heard that article 3 of the Beijing Draft was based on article 11 of the MLMC 1993 with modifications and additions to address issues encountered in practice. It was explained that article 3 sought to strike a balance between fairness and efficiency. It was acknowledged that notice of a judicial sale raised fundamental issues of due process for affected parties. Nevertheless, the difficulty in identifying and reaching affected parties, including holders of maritime liens, was recognized. It was also reiterated that delays in the judicial sale had a detrimental impact on the value of the ship and the crew onboard.

68. The view was restated that the notification requirements in article 3 should be linked to the grounds for refusal in article 8 (see para. 63 above). The importance was noted of drafting notification requirements that were adapted to the judicial sale itself (as opposed to the proceedings giving rise to the judicial sale, or proceedings related to the distribution of proceeds of sale) and drafted in a way that did not expose the recognition of judicial sale to unnecessary challenge.

69. The Working Group heard that, unlike the MLMC 1993, article 3(1) provided for notices to be given not only by the competent authority, but also by "one or more parties to the proceedings resulting in such Judicial Sale". A concern was raised that, together with article 5, the instrument would require the competent authority to certify that the party complied with the notification requirements.

70. Questions were raised as to how article 3(1)(c) would be implemented. It was stated that it would be impractical to require courts to reach out to potential holders of maritime liens. It was explained that the purpose of the draft instrument would be defeated if article 3 were to be read as providing holders of maritime liens with a right to stop the judicial sale. The notification contemplated in article 3 was instead intended to alert them about an impending judicial sale, after which they would have the opportunity to make a claim on the proceeds of sale in the State of judicial sale. It was agreed that a stronger delineation between a judicial sale and the distribution of proceeds would be necessary in the draft instrument, as a concern was raised that there could be an involuntary extension of the draft instrument to the proceeds of sale (see also discussion about proceeds of sale in para. 22 above).

71. It was noted that article 3(4) did not include the requirement in article 11(3) of the MLMC 1993 that electronic means of notification provide confirmation of receipt. It was observed that many States had enacted legislation based on the Model Law on Electronic Commerce,[5] which provided that a message was received when it was capable of being retrieved in the email system of the addressee. Moreover, it was observed that, in practice, no electronic communication system provided that functionality. Since the absence of an acknowledgment might create a presumption that the message was never sent, the Working Group agreed that it was preferable not to include the requirement.

72. It was suggested that article 3(5) of the Beijing Draft be deleted in favour of a general provision governing the interaction with other international instruments. With regard to notification, it was observed that many States were party to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) ("Service Convention"), which potentially applied to the service of notices provided for in article 3. The Secretariat was requested to analyse the relationship between the Service Convention and the draft instrument (see also

[5] United Nations publication, Sales No. E.99.V.4.

para. 45 above on the relationship between the draft instrument and the Apostille Convention).

73. In response to a suggestion that the registrar in the State of registration be required to publicize the notice, it was observed that a more useful method to give notice of the judicial sale could include publication in maritime periodicals, which would reach creditors beyond both the State of registration and State of judicial sale. In any case, it was observed that most categories of holders of maritime liens, having made the commercial decision to allow the ship to exit their jurisdiction, would therefore have an interest in tracking the ship and being informed of any arrest or suit. In that connection, the Working Group was reminded of an earlier suggestion that the draft instrument establish a centralized repository of certificates of judicial sales (see para. 46 above), and agreed that such a mechanism could also maintain a record of notices of judicial sales that was publicly available online.

74. It was suggested that the registrar should receive notice before other affected parties. Among other things this would allow the registrar to provide information needed for the competent authority to notify the other affected parties. In response, it was suggested that no differentiation in the notice period would be necessary as the other parties would still need to be provided 30 days' notice, and that different standards within an instrument could lead to confusion. As an alternative, it was suggested that the instrument contain a provision similar to article 14 of the MLMC 1993 providing for cooperation between authorities.

75. The view was expressed that the notification period in article 3 was too short. A suggestion was made to consider "working day" in lieu of "calendar day", which appeared in the definition of "Day" in article 1(f), although it was noted that it would be difficult to account for all working days across jurisdictions. A concern was also raised that the seven-day notification requirement in advance of the judicial sale in article 3(3)(b) might have the effect of superseding the 30-day notice requirement in the chapeau of article 3(3). The Working Group was reminded that article 3 established minimum standards for notification (see para. 30 above) and that, for notice to be effective, both the requirements in the draft instrument and the requirements of the law of the State of judicial sale would need to be observed. It was reiterated that States would not be precluded from providing a higher standard than that in article 3 of the Beijing Draft.

7. Article 1. Definitions

76. As a general comment, it was suggested that the Beijing Draft be revised with a view to minimizing the number of definitions. It was also suggested to consider instances in which a defined term was used in a particular provision, and to elaborate the definition of that term in the text of that provision instead of in a separate provision on definitions.

(a) "Certificate"

77. It was observed that the term "Certificate" was defined in article 1(a) to include a certified copy of the certificate referred to in article 5, whereas article 6(4) distinguished "Certificate" and a "duly certified copy" thereof. It was added that this inconsistency was a matter of drafting.

(b) "Charge"

78. It was suggested that the definition of the term "Charge" in article 1(b) could be redrafted to remove duplication. It was noted that the definition in the Beijing Draft differed from the term used in the MLMC 1993, particularly insofar as the latter distinguished "charge" from maritime liens and likened them to mortgages and hypothèques.

79. It was explained that the term "Charge" was intended to cover all kinds of private rights and interests that could be enforced in rem. There was general

agreement that the term “arrest” be deleted from the definition since the arrest of a ship was a procedural remedy rather than a right. It was suggested that the effect of a judicial sale on any additional arrest would be better addressed in a substantive provision. There was also a concern that the reference to arrest could imply that the term “Charge” covered the seizure of goods in tax or criminal procedures, which would then have the effect, pursuant to article 4, of extinguishing the power of authorities to seize a ship following its judicial sale. It was suggested that this concern might be addressed by excluding from scope forced sales for which the proceeds were not to be paid out to creditors (see para. 19 above). Alternatively, a suggestion was made to limit the scope of application of the instrument to civil and commercial matters.

80. It was suggested, for the sake of clarity, that the definition of “Charge” be inverted such that it start with a general definition of a charge as any right that might be asserted against the ship, then continue to list specific examples. It was noted that not all the examples listed in the original (English) version of the Beijing Draft were readily translatable into other languages.

(c) “Clean Title”

81. It was suggested that the definition of the term “Clean Title” omit the words “unless assumed by any Purchaser”, on the basis that any residual rights should be addressed in article 4 (see further discussion at para. 32 above).

(d) “Competent Authority”

82. The Working Group engaged in detailed discussions on the definition of the term “Competent Authority”. As a preliminary remark, it was observed that the term was used in the Beijing Draft potentially to refer to three different authorities, namely (a) the authority ordering the judicial sale, (b) the authority conducting the judicial sale, and (c) the authority issuing the certificate of judicial sale. On that basis, it was then suggested that the definition in article 1(d) was not apt to describe all of these authorities.

83. Some concern was raised about using the term “Person”, as defined in article 1(l), to define the term “Competent Authority”. While it was accepted that the instrument needed to respect the variety of authorities engaged in judicial sales within national legal systems, the concern was expressed that the inclusion of “Person” in the definition of “Competent Authority” could potentially allow for the recognition of judicial sales by individuals. It was suggested that the term “Person” be deleted from the definition or its scope be narrowed. It was also suggested that the term “authority” could be defined to refer to public bodies or persons vested with public authority, such as notaries.

84. A further suggestion was made that, if the instrument were to take the form of a convention, a mechanism could be set up by which a State joining the convention would be required to notify the depositary of the authorities competent in its jurisdiction for the purposes of the convention (which could include different authorities for the purposes of different provisions of the instrument). At the same time, it was noted that this mechanism, while not uncommon in international legal cooperation conventions, might impose a particular burden on federal States.

(e) “Court”

85. Several concerns were expressed with the definition of the term “Court”. First, the view was expressed that the instrument should not interfere with a State’s internal organization of its courts. Second, it was observed that it was not always the role of a court to “determine the matters covered” by the Beijing Draft. After discussion, the Working Group agreed to delete the definition, while noting that this did not in any way deny the role of courts in the judicial sale of ships.

(f) "Interested Person"

86. It was recalled that the definition of "Interested Person" in article 1(g) had been discussed by the Working Group in its consideration of article 7(4) (see para. 55 above). It was noted that the term was used in articles 7 and 8 to define the classes of persons with standing to challenge the judicial sale and to challenge its recognition abroad. The view was expressed that it was not necessary to offer a definition of "Interested Person" as it might affect the right to access to justice. In that context, reference was made to the concerns expressed when article 7(4) was discussed (see para. 55 above). A suggestion was therefore made to delete article 7(4) or, in the alternative, to include holders of maritime liens in this definition.

87. The suggestion was reiterated that the definition of "Interested Person" be expanded to include the classes of persons to which notice of the judicial sale was to be given under article 3, which would include holders of maritime liens (see para. 55 above). On the one hand, it was noted that, if a particular class of persons was to be notified of a judicial sale, it was difficult to justify denying that class standing to challenge the sale. On the other hand, it was reiterated that, while additional classes such as holders of maritime liens might have an interest in the proceedings giving rise to the judicial sale, as well as the distribution of proceeds of that sale, it was doubtful that they had a legitimate interest in challenging the judicial sale. It was explained that, while an earlier version of the Beijing Draft had included holders of maritime liens within the definition of "Interested Person", this was subsequently removed for this reason.

88. The Working Group agreed to consider expanding the definition to include a holder of a maritime lien that had filed its claim to the court, and to place the additions to the definition in brackets for review at a subsequent session. It was further suggested that the definition of "Interested Person" be deleted entirely and that the instrument instead identify appropriate classes of persons in the relevant provisions.

(g) "Judicial sale"

89. The Working Group recalled earlier observations that the current definition of "judicial sale" incorporated two substantive elements: (1) the conferral of clean title, and (2) distribution of proceeds to creditors (see para. 31 above). It was generally accepted that these elements were worth considering in the context of a provision on scope or in the provisions regarding the legal effect of judicial sales.

90. Further to earlier discussions on the definition of "Competent Authority" (see para. 83 above), it was suggested that the term "judicial sale" might imply that the instrument did not apply to sales ordered or conducted by non-judicial bodies. It was added that, in order for the instrument to have broad appeal among States, it should respect differences between States as to how the sales were carried out. It was observed that the MLMC 1993 used the term "forced sale", but there was concern that this term could imply that the instrument applied to forced sales in tax, administrative and criminal matters (see further discussion at para. 19 above).

91. There was support for the view that the starting point for the instrument was that it apply to sales by courts. There was some reservation to applying the instrument to sales by non-judicial bodies given differences in the procedure leading to the sale. There was also support for the view that the definition of "Judicial Sale" refer to sales that were "ordered" or "confirmed" by a court. It was suggested that a further element for the definition be that the sale result from a claim asserted against the ship (and not against the shipowner *in personam*). The point was made that the definition should be drafted so as not to exclude sales *pendente lite* (i.e., prior to final judgment in the proceedings giving rise to the judicial sale).

8. Article 2. Scope

92. The Working Group considered whether the instrument should apply to judicial sales for which clean title was conferred on the purchaser under national law, or

whether it should apply more broadly to mandate that all judicial sales confer clean title. It was reiterated (see para. 37 above) that the instrument could accommodate so-called “qualified” judicial sales by which some rights and interests in the ship were preserved following the judicial sale. For States under whose national law a judicial sale did not have the effect of extinguishing all rights and interests, it might not be possible to specify in advance the types of sales that would result in the conferral of clean title, as this was dependent on the claims made in the proceedings giving rise to the judicial sale on a case-by-case basis.

93. The Working Group asked the Secretariat to prepare a revised text that reflected each of these options. When considering options, the Working Group was encouraged not to lose sight of the fundamental objective of the instrument to facilitate the deregistration of the ship by way of the certificate of judicial sale.

94. It was proposed that the Working Group focus its work on an instrument that conferred jurisdiction for judicial sales on the State of registration. That State would have best knowledge of the ship and the registered mortgages/hypothèques and charges attached to the ship. In response, it was observed that the proposal would effect a significant change in the focus of the Beijing Draft, and constitute a fundamental departure from how judicial sales were carried out in practice.